No. 14575

In the United States Court of Appeals for the Ninth Circuit

OVETA CULP HOBBY, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

RALPH B. THORBUS, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on August 12, 1954, by the District Court for the Southern District of California, Central Division, reversing the decision of the Secretary of Health, Education, and Welfare that appellee was not entitled to old age insurance benefits (R. 86). The suit was brought by the appellee on November 4, 1953, to review the determination of the Department of Health, Education, and Welfare that appellee's income was derived from "rentals from real estate" and was therefore not within the self-employment provisions of the Social Security Act.

After reviewing the administrative record, the District Court made findings of fact and conclusions of law and entered judgment for appellee. The jurisdiction of the District Court was founded upon Section 205(g) of the Social Security Act. 53 Stat. 1370, as amended, 42 U. S. C. 405(g). This Court's jurisdiction is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

On February 25, 1953, appellee filed an application for old age insurance benefits with the Social Security Administration in which he stated that the basis of his claim was income as a self-employed person from the operation of an apartment house (R. 51-52). He attached copies of his 1951 and 1952 self-employment tax returns, each of which indicated that his annual income exceeded $3600, the maximum amount subject to self-employment taxes (R. 53-55). In a statement accompanying the application, appellee described at length the nature of his self-employment, and enumerated services which he claimed he had performed for the tenants in his apartments (R. 58-59).

On April 1, 1953, the Bureau of Old Age and Survivors Insurance of the Social Security Administration notified appellee that his claim for benefits had been denied on the ground that he had not had six calendar quarters coverage as required by the Social Security Act (R. 64-65). The reason for disallowance of appellee's claim was clearly set forth at the end of the letter where it was stated, "it has been determined that your income in 1951 and 1952 was income from real estate rentals and not self-employment income." After receipt of the notice of disallowance of his claim, on April 17, 1953, appellee filed a request for hearing by a referee

in accordance with the provisions of the Social Security Act (R. 41-42). The hearing which was scheduled for June 10, 1953, was to determine "whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953," which question would be resolved on concluding "whether claimant's income from operation of an apartment house was excluded from 'net earnings of self-employment' as rentals from real estate" (R. 39-40). In a letter to the referee, prior to the hearing, appellee restated the circumstances of his self-employment, once again particularizing the services which he claimed to have performed for his tenants (R. 66-68).

A summary of the testimony at the hearing (R. 43-50) is as follows: For the twenty-two years preceding his claim for retirement benefits, appellee had leased an apartment house from the First Methodist Church of Los Angeles and had in turn leased the thirty-seven apartments contained therein to various tenants. The rentals in this building, the Knickerbocker Apartments, ran from $4.00 to $6.50 per week. Each apartment was completely furnished and was provided with a stove, an ice box, cooking and eating utensils, brooms, etc. The rental included the cost of heat and utilities but it did not include the cost of ice which the individual tenants obtained from an ice man each day. On the back porch on each floor were rubbish barrels in which the tenants could discard trash and garbage.

Appellee further testified that he and his sole employee, a housekeeper, took care of the office, showed apartments to prospective new tenants, and exchanged soiled linens for laundered linens for those tenants who wished to do so at a charge equal to the cost of launder-

ing. Although he occasionally cleaned and renovated apartments between tenancies, neither he nor his housekeeper ever cleaned the inside of the apartments or provided any interior services during tenancies.

In his unsworn letter to the referee, to which he made reference during his testimony, appellee listed certain other services provided (R. 67-68). He stated that telephones were available to the tenants on each floor and that tenants were summoned to answer telephone calls by a buzzer system, that he maintained a workshop and a store room for tools and supplies, that he made certain repairs in plumbing, wiring, etc., that he provided newspapers and magazines in a main lobby, that he cleaned the porches and steps in front of the building and the alley in the rear of the building, and that he provided wash lines and laundry facilities for the tenants. He also mentioned that a manager in the lobby answered telephones and inquiries, but he did not make clear whether he or his sole employee, the housekeeper, was that manager.

On the basis of this evidence, the referee decided that "the rentals continued to be excluded [from coverage] as rentals from real estate" (R. 38). Thereupon appellee filed a request for review of the referee's decision by the appeals council and attached an affidavit setting forth substantially the same facts as presented to the referee but providing slightly greater detail (R. 30-33). When the request for review was denied by the appeals council (R. 25-26), appellee brought this action in the District Court for the Southern District of California pursuant to Section 205(g) of the Social Security Act. The District Court took no new evidence except for a stipulation that appellee had in fact paid to the Government the sum of $81.00 in 1951 and 1952, purportedly as

self-employment taxes. After hearing argument on the meaning of the "rentals from real estate" exception to the self-employment provisions of the Social Security Act and the administrative regulations relating thereto, the District Court concluded that the administrative finding was erroneous and granted judgment for appellee. The court set forth the reasons for its decision in a Memorandum of Decision (R. 69-76), made findings of fact and conclusions of law (R. 76-85), and ordered the Department of Health, Education, and Welfare to commence payment of old age insurance benefits to appellee in March, 1953 (R. 85).[1] The Court further ordered that appellee recover from the Secretary his costs and disbursements incurred in the action.

QUESTIONS PRESENTED

1. Whether Section 404.1052(a) of Social Security Administration Regulation No. 4 is a valid interpretation of the "rentals from real estate" exception of the Social Security laws as provided in Section 211 of the Social Security Act.

2. Whether the finding of the Administrator that appellee had derived his income from "rentals from real estate" was supported by substantial evidence.

3. Whether, in the absence of statutory authorization, costs can be imposed upon the Administrator sued in her official capacity.

STATUTE AND REGULATION INVOLVED

Section 211(a) of the Social Security Act and Section 404.1052 of Social Security Regulation 4, whose interpretation and application are here involved, are

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[1] Though the amount of such benefits does not appear in the record, reference to the Act indicates that $98.50 per month would be paid to appellee if the present judgment were upheld. 68 Stat. 1064, revising 42 U.S.C. 415.

set forth below in pertinent part. Additional sections of the Social Security Act which are relevant to this appeal are printed in the Appendix, *infra,* pp. 22-26.

Section 211(a) [64 Stat. 502, 42 U.S.C. 411(a)]:

> The term "net earnings from self-employment" means the gross income, as computed under chapter 1 of Title 26, derived by an individual from any trade or business carried on by such individual, less the deductions allowed under such chapter which are attributable to such trade or business, plus his distributive share (whether or not distributed) of the ordinary net income or loss, as computed under section 183 of Title 26, from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary net income or loss—
>
> (1) There shall be excluded rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto, unless such rentals are received in the course of a trade or business as a real estate dealer; * * *

Section 404.1052 [16 Fed. Reg. 13074, 20 C.F.R. 404.1052] Income excluded from net earnings from self-employment.—For the purpose of computing net earnings from self-employment, the gross income derived by an individual from a trade or business carried on by him, the allowable deductions attributable to such trade or business, and the individual's distributive share of the ordinary net income or ordinary net loss from any trade or busi-

ness carried on by a partnership of which he is a member shall be computed in accordance with the following special rules:

(a) *Rentals from real estate.*—Rentals from real estate (including personal property leased with the real estate), and the deductions attributable thereto, unless such rentals are received by an individual in the course of a trade or business as a real estate dealer, are excluded. * * *

Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple-housing units are generally rentals from real estate. Except in the case of real estate dealers, such payments are excluded in determining net earnings from self-employment even though such payments are in part attributable to personal property furnished under the lease.

Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service;

whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant.

Except in the case of a real estate dealer, where an individual or a partnership is engaged in a trade or business the income of which is classifiable in part as rentals from real estate, only that portion of such income which is not classifiable as rentals from real estate, and the expenses attributable to such portion, will be included in determining net earnings from self-employment.

SPECIFICATION OF ERRORS

1. The District Court erred in reversing the administrative finding when the administrative decision was supported by substantial evidence.

2. The District Court erred in its construction of the "rentals from real estate" exception to the Social Security laws upon which it based its judgment.

3. The District Court erred in failing to give sufficient weight to the administrative regulation as a reasonable interpretation of the "rentals from real estate" exception to the Social Security laws.

4. The District Court erred in determining that plaintiff was a self-employed person within the meaning of the Social Security Act, as amended, and was thereby entitled to Old Age Insurance Benefits provided in said Act.

5. The District Court erred in granting judgment to plaintiff.

6. The District Court erred in assessing costs against the Administrator in the absence of statutory authority therefor.

SUMMARY OF ARGUMENT

I

The objections raised in this appeal are that the District Court did not employ the proper criteria for determining whether income is "rentals from real estate," excluded from self-employed income by Section 205(g) of the Social Security Act, that it failed to give sufficient weight to the Secretary's determination that plaintiff's income was derived from such rentals, and that as a part of its judgment it improperly assessed costs against the Secretary. The correct interpretation of the statutory exception, we submit, is incorporated in the governing administrative regulation. That regulation, which was referred to but not clearly applied by the District Court, establishes that the rendering of numerous personal services to the occupants of multiple housing units changes the character of such rentals and removes them from this statutory exception, while the performance of services which are customarily rendered in the general operation of the building, though they may also be for the tenants' convenience, do not alter the nature of the income or entitle the landlord to Social Security Benefits. The District Court, on the other hand, seems to have considered the "rentals from real estate" exception applicable only in cases of passive receipt of income accompanied by minimal maintenance services. The regulation, whose validity was never challenged by appellee, appears to be perfectly consistent with the statutory language and is therefore a binding interpretation of the statute. It is supported, for example, by the fact that it was copied in large part from the reports of Congressional Committees leading to the enactment of the statutory section involved.

II

Although the District Court should have limited its review to a determination of whether the Administrator's decision was supported by substantial evidence in the administrative record, it appears that a much broader review was made. We suggest, however, that upon proper review the administrative finding should be upheld as clearly supported by substantial evidence. A comparison of the services provided by appellee with those considered in the regulation to be a basis for removing rentals from the statutory exception demonstrates that appellee was, in fact, deriving his income from "rentals from real estate."

III

In addition to the above errors the District Court allowed the plaintiff to recover costs in spite of the fact that, under well-established principles, costs cannot be taxed to the Administrator in a suit brought against her in her official capacity.

ARGUMENT

I

The District Court Erred in Applying a Standard for Determining Whether Appellee's income Was Derived from "Rentals from Real Estate" Which Differed from the Standard Set Forth in the Administrative Regulation.

Appellee is entitled to social security benefits only if it is demonstrable that he had six calendar quarters of coverage and is therefore "a fully insured individual." His claim was founded upon amounts paid by him as self-employment taxes for 1951 and 1952 for income from the operation of a 37-unit apartment house; it was rejected by the Social Security Administration on

the ground that the income involved represented rentals from real estate, which are excluded from self-employment income by Section 211 of the Social Security Act,[2] set forth, *supra*, p. 6. That determination, which was based on an application of Section 404.1052(a) of Social Security Regulation 4,[3] was overturned by the District Court apparently applying a different standard. In so doing, we submit, the district court committed error since the administrative regulation governs the interpretation of this section of the Act.

Section 211 defines net earnings from self-employment so as to exclude "rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto." The Act makes no further definition of the phrase "rentals from real estate," but Section 205(a) of the Act[4] empowers the Administrator "to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions." Where there is no statutory authority for administrative regulations, the contemporaneous interpretation of the statute administered by that agency is given great weight. *Skidmore* v. *Swift & Co.*, 323 U. S. 134; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534. On the other hand, when the statute authorizes the issuance of administrative regu-

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[2] 64 Stat. 502, as amended, 42 U.S.C. 411. The same definition is incorporated in the Internal Revenue Code in the self-employment tax section. 26 U.S.C. 481(a). The new code merely renumbers this section I.R.C. (1954) § 1402.

[3] 16 Fed. Reg. 13074, 20 C.F.R. 404.1052, set forth, in pertinent part, *supra*, at pp. 6-8.

[4] 53 Stat. 1368, as amended, 42 U.S.C. 405(a), *infra*, p. 22. Regulations are also authorized under Section 1102, 49 Stat. 647, as amended, 42 U.S.C. 1302.

lations, the regulations are not only given great weight but are given the force of the statute, itself, unless they are unreasonable or inconsistent with the express language of the Act. See *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Atchison, T. & S. F. Ry.,* v. *Scarlett,* 300 U. S. 471, 477; *Forbes* v. *United States,* 125 F. 2d 404, 409 (C. A. 9); *Roberts* v. *Commissioner,* 176 F. 2d 221, 223 (C. A. 9). Since Section 205(a) does authorize the issuance of regulations for the implementation of this Act, Social Security regulations have generally been treated as having such binding significance. *E. g., United States* v. *Lalone,* 152 F. 2d 43 (C. A. 9).

Nor can the validity of Section 404.1052(a) of Social Security Regulation 4 be reasonably challenged on the ground that it contradicts the statute. Rentals of real property and associated personalty could be interpreted to include hotel accommodations, boarding house rooms, parking lot space, warehouse storage, or automobile garage stalls. However, each of these types of rentals is excepted from the regulation's definition of such rentals; thus, if the regulation fails to restate the proper meaning of Section 211, it errs on the side of liberality to claimants. Moreover, the propriety of the regulatory interpretation is further emphasized by the fact that a large portion of the regulation is an almost verbatim copy of language used to describe the effect of Section 211 in the House and Senate Reports leading to its enactment. See Sen. Rept. No. 1669, 81st Cong., 2d Sess. 156; H. R. Rept. No. 1300, 81st Cong., 1st Sess. 137.

> Payments for the use or occupancy of entire private residences or living units in duplex or multiple-

> housing units are generally rentals from real estate. Except in the case of real estate dealers, such rentals are excluded under paragraph (1), even though in part attributable to personal property furnished under the lease. On the other hand, payments for the use or occupancy of rooms or other space, where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages do not constitute rentals from real estate.

The only significant addition to the above language, made by the regulation, was the suggestion of some services which would cause income to be removed from this excluded category. Surely this attempt to define by example does not render the regulation invalid when those examples reasonably follow from the language of the statute and its legislative history.

Finally, it is important to note wherein the District Court's standard differed from the regulation. In its third finding of fact (R. 78) and its first conclusions of law (R. 84), the court indicated that the basis of its decision was the bare statutory provision without regard to the interpreting regulation, yet nowhere was a finding made that the regulation is unreasonable or inconsistent with the statute. Its tenth findings of fact (R. 82-83) indicates that the District Court would not classify income as rentals where the claimant can show that some "services rendered in the operation of his business were services rendered primarily for the comfort and convenience of his guests, and not of a merely

custodial or maintenance nature." The regulation, on the other hand, contrasts services rendered "primarily for his [*i.e.,* the tenant's] convenience," with services "customarily rendered in connection with the rental of rooms or other space for occupancy only." To further explain this distinction the regulation suggests that maid service is an example of the former while the cleaning of areas outside the rented rooms is an example of the latter. In other words, to be sufficient to remove income from the rental classification, services must be of a personal nature to the tenants and relate more closely to individual lessees than to the general operation of the establishment. Some factors which could aid in this classification process might be the frequency of the services, the locale of their performance (within or without the leased premises), the servile nature of the acts, and the control of the individual tenant over the manner of performance. Such a standard appears to differ substantially from the "merely maintenance" rule applied by the District Court.

In its Memorandum of Decision, the court set forth the regulation, but proceeded to construe it as supporting its own construction of Section 211. We submit that it was error not to defer to the administrative interpretation of its own regulation when such a construction was not unreasonable. Cf. *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410; *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431 (C. A. 9), certiorari denied, 329 U. S. 720. The test applied in the Memorandum of Decision is made clear by the statement that the factors considered significant by the Court "all inescapably leave the conclusion that plaintiff was not merely a receiver of rentals from real estate, but rather,

that he conducted a business on the premises, offering not only apartment facilities, but also many services to the occupants of the building" (R. 76). Certainly this standard of passive receipt of income differs substantially from the test outlined in the regulation, where such services as the cleaning of public stairways and lobbies and the collection of trash are expressly stated to be insufficient to remove income from the "rentals from real estate" classification.

II

The District Court Erred in Reversing the Administrative Finding Which, under the Proper Criteria for Determining Coverage, Was Clearly Supported by Substantial Evidence.

Section 205(g) of the Act,[5] which was the basis for the District Court's jurisdiction, carefully limits the scope of review after an administrative finding. Not only does that section provide that "[t]he findings of the Administrator as to any fact, if supported by substantial evidence shall be conclusive * * *" but it also specifies that the District Court's order shall be based "upon the pleadings and transcript of the [administrative] record." The District Court's function is thus to examine the administrative record in order to determine whether the Administrator's decision was supported by substantial evidence; the District Court is not empowered to conduct a trial *de novo* of the issues or to substitute its judgment for the Administrator's in close cases. *Thompson* v. *Social Security Bd.*, 154 F. 2d 204 (C. A. D. C.); *Walker* v. *Altmeyer*, 137 F. 2d 531 (C. A. 7); *United States* v. *Lalone*, 152 F. 2d 43 (C. A. 9); *Hobby* v. *Hodges*, 215 F. 2d 754 (C. A. 10). There is

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[5] 53 Stat. 1370, as amended, 42 U.S.C. 405(g), *infra*, pp. 23-25.

even substantial doubt whether the Court had power to make independent findings of fact, as was done in this case. Cf. *In re Chicago, M., St. P. & P. Ry.,* 138 F. 2d 433 (C. A. 7). It is the Secretary's position that the District Court, in the present case, though purporting to apply the substantial evidence rule, in fact employed a principle of much broader review and based its decision on an independent determination of the validity of appellee's claim.

In this respect, the case bears a marked resemblance to this Court's decision in *United States* v. *Lalone,* 152 F. 2d 43 (C. A. 9). In that proceeding the District Court had overturned an administrative finding that the claimant was not entitled to Social Security benefits on the ground that he was not an employee within the meaning of the governing regulation. On appeal, this Court reversed and clearly set forth the scope of review in these cases: [6]

> Whether Barrett & Co. was a partner or an employer of Lalone is partially a question of interpreting the applicable statutes and regulations and partially a matter of construing surrounding facts. The board's decisions interpreting the Act and regulations are entitled to weight; the board's findings of fact, if supported by substantial evidence, are conclusive. [citations omitted]

We submit that a reexamination of the administrative record (R. 23-68) will demonstrate that the Secretary's

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[6] 152 F. 2d 43, 45 (C.A. 9). The scope of review in the present case and in the *Lalone* decision can be contrasted with this Court's ruling in *Miller* v. *Burger,* 161 F. 2d 992 (C.A. 9), where "no genuine issue as to any material fact" was presented and the bare statutory language was being interpreted without the aid of administrative regulations.

finding, when viewed as an application of the governing regulation, is amply supported by evidence contained therein.

Although many of the facts which appellee offered as supporting his claim were seemingly irrelevant, we will attempt to restate all of them as fully as possible. In two of his letters to the board, appellee relied heavily on the fact that he was not the owner of the apartment building but was a lessee who was subleasing to his tenants. This would appear to have no significance whatever in the resolution of the present issue since the statute and regulation involved deal with the classification of income regardless of the source of the property from which that income was derived. He also claimed the great number of hours spent by him in managing the building demonstrated that his income was not rentals from real estate; however the test imposed by the regulation is the nature of the facilities and/or services for which payment was received—not the amount of effort expended by the claimant. In his letters and testimony, he referred to the following facilities which he stated were provided at the Knickerbocker Apartments: (1) gas stoves, (2) bathtubs, (3) ice boxes, (4) furniture, (5) brooms, (6) telephones, (7) dishes and cooking utensils, (8) laundry facilities (tubs, lines, clothes pins, ironing boards, irons), (9) rubbish barrels, (10) lights and carpets in the halls, (11) a lobby with magazines and newspapers, (12) individual mail boxes, (13) linens. Since the statute and the regulation both refer to "rentals from real estate *(including personal property leased with the real estate)*" [emphasis added] the significance of these facilities would seem to be expressly denied. Furthermore, it is doubtful whether any of these facilities could reasonably be termed services, let alone serv-

ices primarily for the convenience of the individual tenants, as would be necessary to avoid classifying the income derived therefrom as rentals.

Appellee also set forth, in various letters to the board and in his testimony, the following services which were performed: (1) utilities (*i. e.,* heat, light, gas, water and electricity) were furnished, (2) the public halls, porches, steps and alley behind the building were cleaned, (3) the rubbish in the rubbish barrels outside the apartments was periodically collected, (4) occasional repairs were made to rooms and facilities (though there is no indication that such repairs were made during tenancies rather than between tenancies), (5) apartments were occasionally renovated between tenancies, (6) mail was sorted into individual mail boxes in the lobby, (7) on occasion, messages were taken and callers were directed to tenants, (8) linens were exchanged at the office if the tenant would pay the cost of laundering, (9) tenants were notified of telephone calls by a buzzer system. Items (1)-(3) are disposed of by the express language and the specific examples included in the regulation. Items (4)-(7) fail to remove appellee's income from the rental classification since they are not personal or hotel-like services but are services which are often performed in the maintenance of an apartment house that is commonly considered as providing no special services to its tenants. Finally, items (8) and (9) could conceivably be classed as personal services for the tenants, although the linen exchange service was at additional cost to the tenant and was not necessarily part of his rental conditions and the buzzer notification system, which related to phones outside the tenants' rooms, may have been primarily for appellee's convenience in referring calls

rather than for his tenants' convenience in receiving them.

The decision of the Administrator was strongly supported, on the other hand, by appellee's testimony that neither he nor his sole employees ever entered a rented apartment to clean it during a tenancy (R. 47, 48) and that the tenants were obliged to obtain such necessaries as ice for their ice boxes without assistance by appellee (R. 46). Presented with the above evidence and an opportunity to examine appellee in a manner which enabled him to determine the credibility of appellee's testimony,[7] the referee concluded that the services performed were not sufficient to remove appellee's income from the rental classification. It is difficult, if not impossible, at this stage of the proceedings to obtain any insight into the reliability of appellee's statements or their full meaning; only the referee who heard the testimony was in a position to evaluate such non-evidentiary factors. But it is possible here to determine, as we con-

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[7] The District Court relied upon the failure of the referee to expressly state in his written decision that any of appellee's statement was disbelieved as proof that all were believed. That conclusion appears to be without merit, particularly since the referee listed the services which he considered appellee had rendered and that list did not include several of the claimed facilities and services. The referee summarized his understanding of the facts as follows (R. 10):

"It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units including linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the units and provides utilities to the tenants for definite rentals by the week."

tend, that the referee was supported by substantial evidence in his finding.[8]

III

The District Court Erred in Awarding Costs Against the Administrator

It is well established that neither the United States nor its administrative agencies can be taxed interest or costs in the absence of statutory consent. See *e. g., Stanley* v. *Schwalby,* 162 U. S. 255, 272; *United States* v. *Chemical Foundation, Inc.,* 272 U.S. 1, 20; *United States* v. *Worley,* 281 U.S. 339, 344. This rule which relates equally well to an Administrator sued in his official capacity is codified in 28 U. S. C. 2412(a). In *Ewing* v. *Gardner,* 341 U. S. 321, the Supreme Court specifically applied it to the Federal Security Administrator, the predecessor of the present defendant. Therefore the assessment of costs against this defendant, regardless of the decision on the merits of the case, was clear error.

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[8] A large number of the facilities and services provided were not special services to the occupants since they were required by fire, safety, and sanitation laws. See, e.g., *Los Angeles Muncipal Code,* Section 32.00 (person managing apartment house must clean all areas which he controls), Section 57.47 (person managing apartment house must light hallways and stairways at night), Section 57.24 (person having charge of building must dispose of all inflammable materials and store in incombustible receptacles), Section 66.02 (manager of apartment house must provide portable receptacles for garbage, must clean same, and must make accessible for removal), Section 39.04 (person having charge of premises shall not permit accumulation of garbage), Section 96.100 (buildings must be maintained in safe condition), Section 96.112 (unsafe buildings must be repaired if possible). It is also interesting to note that the basis of distinction between apartments and hotels afforded by the ordinances of Los Angeles is that an apartment house provides cooking facilities while a hotel need not necessarily do so. Compare Los Angeles Municipal Code Section 12.000 ("apartment") with *id.* ("hotel").

CONCLUSION

For the above reasons, we respectfully submit that the judgment of the District Court should be reversed and the case remanded with instructions to enter judgment for appellant, or if this Court should affirm the District Court's ruling as to the merits, that the case be remanded with instructions to delete the award of costs.

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APPENDIX

The Social Security Act, provides, in pertinent part, as follows:

Section 202(a) [49 Stat. 623, as amended, 42 U.S.C. 402(a)]:

Every individual who—

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained retirement age (as defined in section 416(a) of this title), and

(3) has filed application for old-age insurance benefits,

shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

* * * * *

Section 205(a) [53 Stat. 1368, as amended, 42 U.S.C. 405(a)]:

The Administrator shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking

and furnishing the same in order to establish the right to benefits hereunder.

Section 205(b) [53 Stat. 1368, as amended, 42 U.S.C. 405(b)]:

The Administrator is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Whenever requested by any such individual or whenever requested by a wife, widow, former wife divorced, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Administrator has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse its findings of fact and such decision. The Administrator is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Administrator even though inadmissible under rules of evidence applicable to court procedure.

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Section 205(g) [53 Stat. 1370, as amended, 42 U.S.C. 405(g)]:

Any individual, after any final decision of the Administrator made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Administrator may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of its answer the Administrator shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a rehearing. The findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Administrator or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Administrator, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the

court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Administrator made before it files its answer, remand the case to the Administrator for further action by the Administrator, and may, at any time, on good cause shown, order additional evidence to be taken before the Administrator, and the Administrator shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

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Section 214(a) [64 Stat. 505, 42 U.S.C. 414(a)]:

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(2) In the case of any individual who did not die prior to September 1, 1950, the term "fully insured individual" means any individual who had not less than—

(A) one quarter of coverage (whether acquired before or after such day) for each two of the quarters elapsing after 1950, or after the quarter in which he attained the age of twenty-one, whichever

is later, and up to but excluding the quarter in which he attained retirement age, or died, whichever first occurred, except that in no case shall an individual be a fully insured individual unless he has at least six quarters of coverage; * * *

Section 1102 [49 Stat. 647, as amended, 42 U.S.C. 1302]:

The Secretary of the Treasury and the Federal Security Administrator shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

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